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Legal Reform in the Soviet Union

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A law degree in the West is a passport to a vast range of career possibilities: political office, senior corporate management, public administration, consulting, an academic post, banking, diplomatic service, or the practice of law itself. This has not been true in the Soviet Union. Its leaders' education and experience have been principally in the sciences or engineering, but Mikhail Gorbachev, like Lenin himself, is an exception. A graduate of the Law Faculty of Moscow University, he impressed observers during his first visit to England with his astute grasp of issues, his willingness to listen to and about other points of view, his logical and rational approach to problems, his restrained assertiveness in argument, and his forthright candor in public addresses.[1] He has come to power at a time when Soviet society is altering the balance in leadership personnel from individuals trained to "build" in the technical sense to persons who understand how to operate within complex decision-making hierarchies as social scientists. Gorbachev epitomizes that transition.

Law in the meantime continues to be at the heart of social change in the Soviet Union. It is a vehicle for changes of the most fundamental character and the proper object of reform itself. Gorbachev's Political Report to the XXVII Congress of the CPSU (February 1986) represented a recipe for legal change and for reliance upon law throughout the Soviet system as a whole, and that theme was echoed and reinforced at the June 1988 Party Conference.

The ethos of *perestroika* and *glasnost'* necessarily accentuates the negative features of the immediate past. It is all too easy to overlook the fact that in many respects the Brezhnev era utilized the law and the legal profession as vital instruments in promoting stability and predictability in Soviet society. The economic reforms of 1965 had themselves stressed ensuring the autonomy and economic accountability of the State enterprises, reducing the control of enterprises by superior agencies, introducing more rational economic indicators for evaluating enterprise performance, and emphasizing productivity, quality, consumer appeal, sales and the like. A thorough reprocessing of the statute book was set in motion. The legal profession was greatly enlarged and the role of contract enhanced; a new set of constitutions and other basic legislation was adopted. Measured by legislative accomplishment, the Brezhnev legacy must rank as among the more substantial since 1917, and in the early years following 1965 the economic reforms produced positive results. Is the Gorbachev era essentially a response, in so far as the legal system is concerned, to the shortcomings of the preceding era? Or is something more emerging: a new spirit, a new direction, a fundamental transformation?

Restructuring, *Glasnost'*, and Legal Style

For evidence of legal reform one ordinarily looks to the statute book. Only in the past fourteen months, however, has the pace of legislation begun to acquire momentum as the economic reforms are set in place. Were the Gorbachev period to be evaluated solely on these terms, the results would be meager and assessments premature. In fact the changes in Soviet law have been more profound but difficult to describe. *Perestroika* and above all *glasnost'* have introduced elements of legal style that are more to be sensed or felt rather than reduced to statutory form.

There is, first, the element of candor and openness. This must be looked at as a matter of degree, to be sure, but is no less real for that. The openness is something sensed more by those who visit the Soviet Union frequently than by those who follow the printed word. In law it has been expressed strong-

1 W.E. Butler, "Law and Reform," in M. McCauley (ed.), *The Soviet Union Under Gorbachev* (1987), p.59.

ly in many ways: in the insistence that legislation be applied rather than evaded, that it be enforced in a democratic and even-handed spirit, that administrative regulations and institutions be seen to be in conformity with superior legislation, that new standards of clarity or specificity be introduced where they are absent in existing legislation, that judges, law enforcement personnel, investigators and other officials conscientiously perform their duties. In short, the demand has been for new wine in old bottles, an approach presaged by some of the "constitutional dissidents" of the mid-1960's who argued that Soviet laws were admirably drafted, if only they were lived up to.

The Soviet press contains an abundance of materials of this nature, some of it treating issues rarely discussed previously but vital to the success of any legal system — the real crime rates, child abuse, AIDS, narcotics trade and use, abortion and infant mortality, divorce, sexual mores, consumer fraud, and others. Once the early shock of discovery that these phenomena truly do exist has abated, it will become possible to evaluate the data against the standards for the effectiveness of legislation. In late 1986, criminal statistics began to be given for local areas, e.g. the city of Moscow, in the press. Although that practice has not proceeded as rapidly as we had hoped, there are indications that such data may be officially released.

Sessions of supreme and local soviets at all levels are generating more outspoken debate and questioning. Votes not only are no longer necessarily unanimous, but on occasions are known to defeat or refer back proposals. The Law on Cooperative Societies in the USSR adopted in May 1988 was enacted conditionally, subject to agreed changes being inserted in the final text. The Law was ultimately published on June 9, 1988. Judges are being instructed to be less passive and more searching in their analyses of the records of preliminary investigations. Multiple candidacies for elective office are being experimented with for both State and enterprise posts and the principle of rotating elective office is being extended to a variety of areas traditionally outside that practice. At enterprise level the election of labor collective councils is intended to give institutional expression to the principle of self-management and democracy. Here, the practice is mixed, but a certain canniness emerges, for notwithstanding specific recommendations to the contrary, a considerable percentage of enterprises elected their own director to be the council chairman, a practice that would seem to defeat the very purpose of the councils.

To complain more openly, to criticize more sharply and explicitly, does not in and of itself necessarily lead to rectification. For reasons unexplained, in certain areas of the law progress has been limited. Although the official gazette of the Soviet Government now appears almost weekly, reflecting the upsurge in legislative activity, about 12% of enactments are being issued only in summary form — which means no official full text is published — and only 32% of Governmental decrees are appearing in the gazette. Recent examples are the joint decrees of the Government and Party of August 19, 1986 and September 17, 1987 on the restructuring of foreign economic relations.

On the other hand, rectifications have imparted much to the legal style of restructuring. The decision to pardon many individuals convicted in the Brezhnev era of various crimes against the State and the rehabilitation of individuals improperly convicted during the 1930s-50s were part and parcel of the original spirit of *glasnost'*, as have been the reforms in regulations governing authorization to emigrate.

Patterns of Law Reform

Law reform in the USSR is not purely a matter of what new legislation has been enacted in the Gorbachev era and how it alters what was. For more than a decade Soviet law has been experiencing programmed law reform in three forms: (1) the most massive consolidation and systematization of the Statute book since 1825-32 has been brought to completion in the form of the Digest of Laws of the USSR [*Svod zakonov SSSR*] and similar union republic digests; (2) the adoption of the new Soviet constitutions in 1977-78 required considerable new legislation and the reworking of old; (3) since 1977 the USSR Supreme Soviet and USSR Council of Ministers have adopted five-year plans for legislative activities that require the submission of designated draft legislation by ministries and departments at prescribed deadlines. The Gorbachev legal reforms consequently must be viewed against this background. Some enactments are a consequence of the Digest of Laws; some owe their existence to provisions of Soviet constitutions; some originate in the legislative plans; and some either are wholly products of the Gorbachev period or, even though called for in the earlier law reform programs, have been recast in the spirit of *perestroika* and *glasnost'*.

The Digest of Laws of the USSR, published in loose leaf in eleven volumes with supplements, required a decade to complete and was actually seen through press in the post-Brezhnev period. It is an official publication; accordingly its texts carry the same weight of authority and authenticity as the *Vedomosti verkhovnogo soveta SSSR* and the *Sobranie postanovlenii Pravitel'stva SSSR*. The Digest required that many thousands of enactments be repealed or consolidated, a process confirmed volume-by-volume by the legislative and executive agencies concerned.

The Soviet constitutions of 1977-78 made specific provision for the enactment of certain legislation, most of which ensued in the period 1978-82. Some proved to be controversial as such, two examples being the law on holding all-union or union-republic referenda and the legislation on judicial review of administrative acts of officials which impinge on the rights of citizens. The legislative plan itself from 1986-90, though approved in the Gorbachev period, seems in significant part to have been overtaken by *perestroika*, for many recent measures were not expressly foreseen in the plan. Although some have argued that five-year legislative planning seems to take away the spontaneity of the democratic legislative process, there remains strong support for this approach.

The virtues of legislative planning are said to include the ability of the legislators to project the development of social relations in an orderly way. It enables the lawmaker to insist

that draft legislation be prepared over the long-term, unhurriedly, in a coordinated manner, with the possibility of extending the process to all levels of the State apparatus. Legislative programs also are a means for forcing ministries and departments to generate and consider draft enactments; inertia and delay at ministerial level is widely blamed for the poor state of the statute book. Even a fifteen-year legislative program — of the type being developed for other areas of Soviet social and economic life — is being urged. It may well transpire that the Soviet Union will introduce legislation on the procedure for drafting normative acts, as several Eastern European countries have done.[2]

Law, Legality, and Democracy

Since the policy of *glasnost'* has greatly enlarged the scope of candor in the media and in public life generally, it is hardly surprising that the nature and purpose of law, rights, and legality should themselves become the subject of lively debate. One concern is the proper limits of *glasnost'* itself: how tolerant should society be of a diversity of views, and on what subjects? Partly the issues revolve around censorship, definitions of State security, and freedom of the press. A draft law on the press, called for under the legislative plan for 1986-90, is being vigorously debated partly because some fear it may constrain the exercise of free speech, whereas others see it as an opportunity to consolidate that right. In February 1988, legislation on the right of citizens to file complaints, appeals, and applications was amended to exclude the much-abused *anonimka*, the unsigned letter of complaint. Henceforth, all such communications must be properly signed with an address in order to be considered. And there are well-founded concerns about slander and libel in the exercise of *glasnost* by some of the media.

But law and legality are thriving in the midst of *perestroika* and *glasnost'* as never before. Gorbachev himself has stressed on several occasions that both are central: "Without democracy there can be no legality. In turn democracy cannot exist and develop without resting upon legality. Therefore it is called upon to protect society against abuse of power and to guarantee the rights and freedoms of citizens and of their organizations and collectives." With an eye to the past, Gorbachev reminds his Soviet audience: "And we know from our own experience what happens when these positions are departed from."[3] These references to "our own experience" refer not only to the Stalin era. The stagnation of the recent past is partly ascribed to the fact that the "discipline of executing the laws weakened. Elements of arbitrariness and lawlessness again emerged, including among the leaders. Courts, the procuracy, and other agencies obliged to protect public order and to struggle against abuses frequently became the prisoners of circumstances, fell into a position of dependence, and yielded positions of principle in the struggle against violations of the law.There were instances of corruption in the law enforcement apparatus itself."[4] On November 30, 1986 and again in 1988 the Central Committee of the CPSU adopted decrees cautioning the law enforcement establishment to discharge its responsibilities properly and honorably. Press criticism of the police and investigative agencies has been particularly searching.

While there continues to be some discussion on the origins of rights themselves and the extent to which they are absolute and may be invoked against the State or society itself, most of the dialogue concerns *narrower* issues. There continues to be great emphasis upon knowledge of the law; every citizen must know his rights and know how to enforce them, thereby ensuring that State agencies, officials, and other citizens act in conformity with the law. There are increasing references to the primacy of law in all social relations, to the emergence of a socialist legal state" (Rechtstaat), to the principle of minority *rights* against the tyranny of the majority. The legal education of the layman, extensively pursued since 1970, is to take place on a new dimension through "*universal* legal education" (*pravovoi vseucheb*) with emphasis not merely upon a "knowledge of legislation" but also how to apply it against the fabric of a just balance of individual and social rights. The legal correspondent from *Moscow News* addressed these topics recently: "an individual, his social dignity and civil status may be protected only if his rights are independent of public opinion and the 'tasks of the day'. . . Democratic principles will flourish and voluntarism will stop only when society realizes we are all equal under the law. . . We are always asking 'May I?' There are many reasons for this, including the long and persistent humiliation of the individual before organizations, 'bodies,' or the 'majority'. . . we have yet to establish legality as firmly as we have ideology. We have yet to establish the law as a priority in social relations. . . To make the new thinking legal-minded thinking may be even more difficult than it seems. But we have no other way."[5]

Gorbachev's strategy of democratization rests upon the "human factor," which he calls the principle "reserve" that needs to be activated. Participation and responsibility are the keys. Reduced to legal institutions and concepts, these take the form of reforming the electoral process to introduce multiple candidacies; conferring on labor collectives greater decision-making powers, including the right to elect their leaders and take certain decisions themselves (whether this will extend to accept the formation of other political parties remains to be seen); improving the moral climate, which includes raising the standards of legality and eliminating corruption; utilizing the "all-peoples discussion" more extensively as a device for the evaluation of draft legislation; enhancing the powers and responsibilities of local government and trade unions; and devoting more attention to young people and the family. In existing legislation, as already noted, democratization consists of imparting real meaning, or greater substance, to earlier practices.

There is a close link, of course, between Gorbachev's concept of democratization and economic restructuring. If the

2 A.S. Pigolkin, "Sovershenstvovanie sovetskogo zakonodatel'stva na sovremennom etape," *Sovetskoe gosudarstvo i pravo*, no.1 (1988).
3 M.S. Gorbachev, *Perestroika i novoe myshlenie dlia nashei strany i dlia vsego mira* (1987), p. 105.
4 *Ibid.* pp. 106-107.
5 Iu. Feofanov, "The Value of Rights," *Moscow News*, no. 15 (1988), p. 3, cols. 3-4.

reform is seen as further decentralization of the planned economy, then commensurate responsibility must be assumed by those lower entities who are granted larger autonomy. It is the legal system which ultimately must structure and give effect to that allocation of responsibility and independence. The early legal reforms perforce must concentrate on the national economy, for it is with economic matters that the great majority of the 130,000 all-union normative acts are concerned, not to mention the countless thousands of enactments in the fifteen republics.

Legislation in all modern social systems normally undergoes a protracted period of drafting, deliberation, consultation, and even negotiation. Given the law reform machinery and proposals in train that Gorbachev inherited, it would be misleading to look upon all legislation since March 1985 as purely the product of *perestroika*. Some may have been recast in the spirit of restructuring; others seem to reflect the results of economic experimentation predating 1985; and yet others are the culmination of legal reform schemes of long standing (see above).

Social Legislation

Labor discipline, drunkenness, and indolence were the object of an extensive press campaign in the Andropov period, especially late 1984 and early 1985. In mid-May 1985, shortly after Gorbachev took power, these were addressed in a series of enactments that the public associates with the General Secretary himself. In retrospect it is clear that they were closely linked to the philosophy of restructuring, whatever their pre-Gorbachev origins. On May 16, 1985 the USSR and the RSFSR both enacted edicts on intensifying the struggle against drunkenness, alcoholism, and the making of home-brew. They were followed shortly afterwards by the other fourteen republics. The legislation as such was not novel. It strengthened the range of administrative and criminal sanctions to be imposed for violations, introduced price increases, and led to severely curtailed shop hours. Many communities abolished the sale of alcohol altogether. And there began a sustained public campaign against the evils of alcohol abuse, remarkable for its frankness and intensity.

These were followed on May 28, 1986 by three separate enactments directed against the deriving of non-labor income. Although some have attributed sinister motives to the legislation,[6] a major concern appears to be the desire to eliminate or legalize substantial portions of what has been called the "second" or "underground" economy. The concept of "non-labor" income still lacks a general definition in law. The May 1986 legislation eliminates a number of "grey" areas by example and reinforces the ethos that each member of society must make his own contribution and carry his own weight. That the "second" economy reflected both the failures of the official economy and the inability of the economic and legal system to take proper account of other reforms of labor activity — individual and cooperative — has been acknowledged by the enactment of a law on individual labor activity (November 1986) and several enactments on cooperatives (1987-88). For the moment the pendulum has swung in favor of unleashing rather than prosecuting creative endeavor.

Criminal Law and Procedure

The enforcement of Soviet criminal sanctions against dissent and eccentrics was a major source of discord in East-West relations. A very lively debate about how the criminal law should be changed has been brought about because of pardons to many of those serving deprivation of freedom, the release of some held in mental institutions, and official Party endorsement of reforms in criminal law and procedure, coupled with short-term amendments of the union republic criminal codes to cope with AIDS, drug addiction and the like. At the center of the discussion is a Theoretical Model Criminal Code prepared by legal scholars at the Institute of State and Law of the USSR Academy of Sciences.[7] Although some have advocated the adoption of an all-union criminal code, the likelihood is that the present pattern of All-Union Fundamental Principles and fifteen union republic criminal codes will be retained. Under this scheme, the central authorities lay down basic provisions applicable throughout the country, and the union republics develop and elaborate these in their criminal codes in ways appropriate to local circumstances.

Judging from the press and specialist legal media, capital punishment will, if not abolished, be reduced in scope, and the punishment of exile will be eliminated. The policy of "decriminalization" will continue under which lesser offenses will become administrative offenses or merely transgressions. The remaining crimes will be punished at levels that will seem severe because the less socially dangerous acts have been removed from the code. There may be less scope for the reprehensible practice of allowing departmental legislation to define the scale of certain offenses or the categories of culpable individuals. The definitions of "anti-Soviet agitation and propaganda" (Article 70) and of the "circulation of fabrications known to be false which defame the Soviet state and social system" (Article 190-1) may be narrower or, in the case of the latter, even repealed. Definitions of bribery and other official crimes, on the other hand, may require rethinking in the light of gaps in the law disclosed by investigations of corruption during the Brezhnev era.

Criminal procedure is a rather more delicate matter. A Theoretical Model Code of Criminal Procedure was completed in Spring 1988. Its authors have strongly recommended that the term "presumption of innocence" be incorporated to reinforce the substance of that doctrine, and the Central Committee of the CPSU published a decree on November 30, 1986 indicating that the time had come for defense counsel to be admitted to the preliminary investigations in all criminal cases. It is still to be decided at what stage of the preliminary investigation or inquiry they would be allowed — when an individual is taken into custody? When the decision is taken

6 O.S. Ioffe, "'Non-Labour' Income and Individual Labor Activity in the USSR," in W.E. Butler, P.B. Maggs and J.B. Quigley (eds.), *Law After the Revolution* (1988), pp. 47-67.

7 Translated in W.E. Butler (ed.), *Justice and Comparative Law* (1987), pp. 185-240.

formally to initiate an investigation? At some later point? Procuracy and *advokatura* officials with whom I spoke in Spring 1988 favored the first, but the matter remained under discussion.

Letters to the newspapers and other forms of public complaint have commonly detailed charges of connivance, bribery, subservience, and the like directed against investigators who have abused their office. Thoughtful investigators, in a minor counter-offensive, have pointed to what they suggest is an impossible standard for even the most conscientious to satisfy — that upon completion of the preliminary investigation, the investigator is absolutely convinced of the guilt of the suspect. All too often the evidence falls short of that standard, or lends itself to alternative hypotheses, or is incapable of being exhaustively collected and examined within the time and manpower constraints imposed. They suggest the Code of Criminal Procedure lay down a realistic standard for the preliminary investigation. This same realization partly underlies the arguments of those who wish defense present at all stages of the preliminary investigation. By protecting the rights of the suspect, it is argued that the defense counsel will contribute to a better-quality investigation. Many also feel the positions of the investigator would be strengthened if the investigative service were separated from the Procuracy or police or fire agencies and transformed into an independent agency. They believe that having investigators within and subordinate to law enforcement and prosecuting agencies compromises their objectivity and independence.

Constitutional Law and the Courts

To Americans it is extraordinary that the restructuring measures introduced to date have neither required constitutional amendments nor raised constitutional objections. Changes of such a fundamental nature in the American political system would be discussed and taken in the light of constitutional principles. Soviet commentary is disposed to view the Soviet institutions as supple enough to accommodate restructuring or to see restructuring as the cumulation of constitutional standards.

There is nonetheless lively debate about introducing judicial review of the constitutionality of Soviet legislation. The proposals are various. Some Soviet jurists would like to create a Constitutional Council attached to the USSR Supreme Soviet or its Presidium, a proposal endorsed at the June 1988 Party Conference. In fact the latter two bodies already are responsible for ensuring that union republic constitutions and laws conform to those of the USSR, but no procedures have ever been laid down for exercising such supervisory powers. The Constitutional Council would take over that function. Others prefer to see a separate Constitutional Court of the USSR formed, and a third proposal would endow the USSR Supreme Court with the powers of constitutional control, introducing appropriate changes in its structure and composition. All of these suggestions would in some measure compromise the principle of parliamentary supremacy that underlies the present constitutional structure.

Quite apart from the question of constitutionality, there are suggestions to extend the scope of judicial review generally. Some Soviet jurists favor empowering the Procuracy to apply to a court for redress against the adoption of an illegal decision by an administrative agency (instead of issuing a protest, as presently, to the issuing agency or its superior). Recalling the practices of the late 1920s, other jurists suggest the USSR Supreme Court be given the right to declare invalid the decisions of ministries and departments which violate socialist legality. The need for the proposal is reinforced by the widespread practice of departments issuing instructions that violate superior legislation, a practice that may threaten the vitality of restructuring itself. The 1987 USSR Law on the State Enterprise, many believe, is being undermined by departmental decrees that limit the autonomy of enterprise management.

With effect from January 1, 1988 the USSR Supreme Soviet finally laid down the procedural requirements to exercise the right under Article 58 of the USSR Constitution guaranteeing that the "actions of officials committed in violation of the law, in excess of their powers, and impinging upon the rights of citizens" might be appealed to a court. The passage of the legislation, on June 30, 1987, was the stormiest ever seen in the history of the USSR Supreme Soviet, mostly because deputies felt the Law did not go far enough. In fact the Law was adopted subject to further drafting changes being introduced to take account of deputies' observations. Formal amendments were enacted on October 20, 1987, before the law had taken effect. Many remain dissatisfied, however, because it would seem that decisions taken collegially, i.e. by several officials collectively, are outside the scope of the Law and cannot be appealed to a court.

It will be interesting to see the extent to which Soviet citizens use their right and how the courts construe their new jurisdiction. It is by no means evident that Soviet judges are prepared for the type of activism that judicial review involves. Judges under *perestroika* are asked to be more searching and demanding when deciding cases; the acquittal rate reportedly has increased. Some believe the minimum age for election as a judge should be raised. The overwhelming majority of judges now have a higher legal education. The possible sources of extraneous influence on judges are being openly discussed in a sophisticated way; such sources are by no means confined to local Party secretaries. Some jurists and judges urge that a Law on the independence of the judiciary be enacted, elaborating the constitutional standard that "judges shall be independent and subordinate only to law" by defining and proscribing inadmissible forms of interference; for example, by local soviets, the press, or local Party organs.

Also on June 30, 1987 the USSR Supreme Soviet belatedly introduced the procedures for exercising a right guaranteed by Article 5 of the Soviet constitution: that the most important questions of State life are to be submitted for discussion by the whole people and even put to a vote through a referendum. The referendum feature will, no doubt, be lightly used, since genuinely controversial issues are difficult to formulate properly for submission to such a cumbersome procedure. Nation-wide discussion of draft legislation, on the

other hand, has been practiced for some time. In 1987-88 the draft law on the State enterprise, the model collective farm charter and the draft law on cooperative societies in the USSR were among those published for discussion. The press carries letters, articles, and commentary submitted by readers, who often formulate very specific amendments. At the end of the discussion, impressive figures of the numbers of communications received, meetings held, and proposals submitted are released, but it is unclear how many are actually seen by the individuals who evaluate the suggestions and procedures for considering them. Some proposals are adopted, to be sure, but the cumulative effect of the all-people's discussion has never been evident.

Economic Relations

Reform of the national economy lies at the heart of-*perestroika* and *glasnost'*. Two aspects — the 1987 Law on the State Enterprise and joint venture legislation — have been discussed in earlier issues of *The Harriman Institute Forum.*[8] As regards the Law on the State Enterprise, three further points should be made or stressed. First, although it entered into force only on January 1,1988 and many enterprises are still operating under the old legislation, complaints already are appearing that the Law does not go far enough in that departmental instructions are thwarting the intended effects. Second, a significant innovation in the Law is the right of enterprises to sue their superior agency in State *Arbitrazh* for issuing instructions *ultra vires* or violating the law. Such instructions may be declared void in whole or in part by the State Arbitrazh. The enterprise also may sue for compensation of losses incurred as a result of complying with the instructions of a superior agency which violated the rights of the enterprise or because the superior body failed properly to perform its obligations towards the enterprise.

This provision is a minor revolution in administrative law, long advocated by jurists who pointed out that the most frequent offender against enterprise autonomy was the State itself. Suing a superior ministry doubtless is a step not to be taken lightly. Before the end of January 1988, however, such suits were brought when superior agencies imposed compulsory State orders on enterprises that exceeded their capacity.

Third, involvement in foreign economic relations is in principle a legal responsibility of all State enterprises and has been extended to collective farms and other cooperative organizations in the Soviet Union. The restructuring of foreign economic relations commenced by decrees of August 19, 1986 antedated by nearly a year the pattern of economic reform for the national economy as a whole. Just as individual labor activity had flourished in a "second" economy, the State monopoly of foreign trade had in practice become fragmented amongst hundreds of ministries, departments, foreign trade organizations and other entities. Private activities were not a concern, but the efficient operation of the State monopoly had broken down.

The dispersion of the State monopoly was "ratified" and enlarged. Selected State agencies and enterprises have been authorized to trade directly in the foreign market. The remainder are encouraged to create their own foreign trade bodies and operate through ministry foreign trade organizations of one kind or another. The Soviet market is to be exposed more directly to world market standards and competition is to be tolerated. Greater freedom in fixing prices is allowed, and Soviet importers, as end-users, have full direct access to their seller. Dispersion of the monopoly is administered by a new super agency, the State Foreign Economic Commission, with broad powers to coordinate and direct foreign economic policy. The Ministry of Foreign Economic Relations, formed in 1988, has taken over most functions of the former Ministry of Foreign Trade and the State Committee for Foreign Economic Relations. The State enterprises which do earn foreign currency are allowed to retain it and to finance their own export-import transactions.

The State monopoly of foreign trade was further fragmented by authorizing the creation of equity joint enterprises on Soviet territory owned by Soviet enterprises and Western or third-world firms, together with a separate scheme of such entities for partners from COMECON member-countries. The joint enterprises are to finance their foreign partners' profits through export or import substitution earnings.

The fact that Western firms are becoming joint owners and operators of a Soviet corporate entity governed by Soviet law and functioning on Soviet territory has dramatically altered the interaction of the foreign commercial community with the Soviet legal system. Traditionally, East-West contracts have entailed a rather limited exposure to Soviet rules of contract and, in turnkey or similar projects, a certain involvement for construction and technical personnel with the legal regime governing foreigners in the USSR. Under the legal reforms, however, Western investors will need an understanding of the entire legal system and an appreciation of how to work with it.

Collective Farms and Other Cooperatives

The Law on Cooperative Societies in the USSR, an entirely new piece of legislation, and the 1988 Model Collective Farm Charter, which replaces a similar document from 1969, introduce the economic and legal philosophy underlying the State enterprise to the cooperative sector. With appropriate adaptations, many of the same principles regarding economic and legal autonomy apply. Various consumer service cooperatives have received wide publicity in the West, but the enabling legislation is in fact much broader. It extends to the production, procurement, processing, and sale of consumer goods and secondary raw materials; the repairing and servicing of equipment; the extraction of minerals, computer services, various building activities, research, design, management, and other services; or combinations thereof. Thousands of cooperatives have been formed but — a fact

8 See R.E. Ericson, "The New Enterprise Law," *The Harriman Institute Forum*, I, no. 2 (1988); E.A. Hewett, "The Foreign Economic Factor in *Perestroika*," *ibid.*, I, no. 8 (1988).

which is also unappreciated abroad — the great majority do not represent individual *ad hoc* groups of entrepreneurs. Most are organized by existing enterprises and organizations to improve the standard of services and products already offered, such as the small cafés and dining facilities in many large cities.

Labor Relations

Under amendments of 1988, the constitutional premises of labor relations have acquired a different accent. While minimum standards continue to be set by legislation, the restructuring reforms authorize enterprise management, after appropriate consultations, to create preferential conditions, exceeding legislative standards, for high-quality workers and employees. These may include cash increments, payment in kind, or additional leave. The key point, however, is that the earnings of each worker are to be determined by the *final* results of his work (i.e., the quality) and his personal labor contribution, without any maximum limit being imposed.

With the 1987 Law on the State Enterprise imposing greater responsibilities on the labor collective, attention has shifted to the labor collective councils. After some reluctance on the part of the trade unions, it eventually was accepted that in order to function effectively the labor collectives, which consist of the entire labor force, must elect councils to meet in the interval between twice-yearly plenary meetings of the full collective. Decisions of the councils which are binding upon management concern such matters as the distribution of wages, the use of all enterprise funds, and labor and production discipline. If management disagrees with the council, the matter is referred to the general meeting of the labor collective, whose decision binds not only management and its own membership, but also superior State and economic agencies (so long as the decision is not illegal).

Councils of labor collectives originally sprang up spontaneously. After overcoming trade union opposition, they began to be elected on a large scale in Autumn 1987, even before the Law on the State Enterprise had entered into force. While the procedures are essentially for the collectives themselves to determine, "Recommendations" for such elections have been approved by the Central Trade Union Council and USSR State Committee on Labor. The Recommendations suggest that the councils not exceed 30 persons and that neither the enterprise director nor the heads of social organizations in the enterprise (trade union or Party officials) be chosen to act as chairmen of the councils.

The early practice, however, is varied. One plant in Kalinin elected 360 persons, or 10% of the work force, to the council. In large production associations the labor collective bureaucracy itself can be formidable: one production association contained 184 labor collective councils in all production shops and entities and 3000 brigade councils, representing 22,000 workers and employees. And enterprise directors and heads of social organizations are in reality often elected to be council chairmen even though a material conflict of interest is sure to rise. Of 2089 labor collective councils elected in the Moscow Region during late 1987 and early 1988, 1830 chose executive personnel or directors as their chairmen.

A significant legal reform whose roots date back to 1981-82 is the introduction of brigades in industry. By 1988 more than 80% of the industrial work force had been organized into brigades, according to some figures. Where introduced, and they are not suitable everywhere, they have become the lowest production entity in the enterprise. The brigade contracts with management to perform production tasks, and workers are renumerated for their labor on the basis of the overall results of the brigade's work. All members of the brigade — which will usually range from 3 to 80 persons in size — take part in managing the brigade and in distributing the collective earnings. The brigade is administered by a council elected annually, and is led by a leader appointed by management but approved by the council. The brigade council is competent to discuss almost any aspect of brigade activity, and on issues of personnel and wages its decisions are binding. Although management continues to hire individuals under the labor contract, in practice it "invites" a potential employee to join a brigade and if the brigade accepts the individual, an order to hire is issued by management. In effect, the employment of an individual requires the consensus of management and the brigade council, and so does the transfer of an employee.

Earnings are paid by management to the brigade as an entity. About 60% of brigade earnings are distributed on the basis of skills and seniority of members. The balance, treated as bonuses, is distributed at the discretion of the brigade, with a view to rewarding quality of work, discipline, initiative, attitude, and the like. The brigade as a whole suffers for the failure to perform the contract with management properly, and individuals are personally liable for disciplinary violations or financial damage caused to the enterprise. If management breaches its obligations to the brigade, normally the brigade plan is readjusted and entire wages due are paid at tariff rates. If the brigade is at fault for the failure to meet production indicators, it will be paid only for work actually performed without a bonus element.

Future Legal Reforms

The June 1988 Party Conference endorsed many proposed law reforms and gave new momentum to legal *perestroika*. Gorbachev sees the legal system as still imbued with "conservatism," by which he means "command and administrative methods of guidance with numerous prohibitions and petty regulation."[9] All legislation must continue to be revised so as to avoid acting as a "brake" on social development and in the spirit of the principle that everything not expressly prohibited is permitted.

The Conference addressed more explicitly than ever before the fine line between Party guidance and Party interference in the legal system. "Telephone" law is the subject not merely of complaint but sanctions.[10] Judges might be elected for ten-year terms (instead of five years at present) by local

9 *Izvestiia*, June 29, 1988, p. 5, col. 4.
10 Romashova, "'Telefonomu' pravu — net," *Izvestiia*, May 4, 1988, p. 2, cols. 3-6.

soviets (instead of directly by the public at lowest levels). In complex cases the numbers of laymen taking part might be increased from two at present to six or twelve, a proposal widely misconstrued as a form of jury system. And the Conference endorsed the presumption of innocence.

Legislation on the Procuracy already has been twice amended in the Gorbachev period, yet the General Secretary spoke of further changes that would enable the Procuracy to concentrate on its supervisory functions of ensuring compliance with the law. The appointment of A. Ia. Sukharev as the new Procurator General on May 23, 1988 may bring further change. Not a career procurator, Sukharev has served recently in the RSFSR Ministry of Justice; his appointment may be another indication that investigative responsibilities are to be removed from the Procuracy.

The quality of legal education is to be improved by increasing the numbers of full-time day students, expanding clinical courses, and stressing habits of independent thought and study and a knowledge of comparative law. Law textbooks are to have greater regard for the realities of practice. The roles of the advocate and jurisconsult are to be enhanced and their salaries increased.

Party guidance over law enforcement agencies is likely to be tightened. Legislation that took effect on March 1, 1988 removed psychiatric hospitals from the jurisdiction of the Ministry of Internal Affairs and placed them under the Ministry of Public Health. A variety of procedural improvements for persons committed for compulsory treatment, including the right to defense counsel, have been introduced.

In the very short term, possibly by Autumn 1988, the elected representative organs are to be thoroughly restructured. A Congress of People's Deputies consisting perhaps of up to 2250 deputies is to be superimposed upon the present Supreme Soviet. The Congress will meet annually to decide major constitutional, political, and socio-economic issues and to select about 20% of its number to serve in the Supreme Soviet, which will become a more or less permanent legislative organ in frequent session with enlarged powers and responsibilities. The Supreme Soviet would be headed by a Chairman elected by the Congress of People's Deputies; his responsibilities might include general guidance over the drafting of laws, resolving key issues of foreign, defense, and security policy, heading the Defense Council, nominating the Chairman of the USSR Council of Ministers, and performing other duties of a head of State. The Presidium of the USSR Supreme Soviet would operate under his direction, and the legislative commissions would be endowed with many more responsibilities than they presently have.

The object is to increase public involvement in legislative affairs, make government more responsive and democratic, yet preserve the essence of parliamentary supremacy (as opposed to the American concept of separation of powers). Much, of course, must depend upon the fine tuning these proposals will receive when formally submitted for approval in the Autumn. It is intended that they be adapted as appropriate at the union and autonomous republic levels and lower.

Further restructuring of foreign economic relations is to be expected, including more liberal terms for joint enterprises with the West. Soviet authors have been given the right to publish books themselves at their own risk but utilizing the State book distribution system. Major reforms of patent legislation are due in 1988. And the 1000th anniversary of the Russian State and Church has given Russian legal history a remarkable boost.

The atmosphere has changed under *perestroika.* Deftly handled, the legal system is capable of lending powerful reinforcement to Gorbachev's "new thinking."

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